Supreme Court, U.S.
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No. 99-978

IN THE

Supreme Court of the United States

WARREN J. MICHAELS, Executor of the Estate of EDNA L. NELSON, Deceased,

Petitioner,

v.

BANK OF AMERICA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner Warren J. Michaels, Executor of the Estate of Edna L. Nelson, substituted in as plaintiff and appellant in place of Edna Nelson on June 24, 1999, after Edna L. Nelson died.

Respondent Citizens Federal Bank was acquired by NationsBank Corp. in 1996, and NationsBank merged with Respondent Bank of America, N.T. & S.A. in 1999 to form Bank of America, N.A., a national association.

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INTRODUCTION

As servicing agent for Citizens Federal Bank, Bank of America instructed the trustee under a deed of trust to foreclose on real property owned by Ralph and Edna Nelson, at a time when the couple had divorced and Ralph Nelson was in bankruptcy. Bank of America obtained relief from the automatic stay, the trustee foreclosed, and Citizens purchased the property at the sale. The crux of Edna Nelson's complaint is that Bank of America perpetrated a fraud by obtaining relief from the automatic stay in her ex-husband's bankruptcy case when Citizens was the beneficiary under the deed of trust and should have obtained the relief itself. Until more than two years after the foreclosure sale, she never denied that the loan was made or that the payments were in arrears. She misreads the Trustee's Deed Upon Sale to state that Citizens foreclosed on the property when it names Citizens only as the purchaser. Since 1993, Nelson has engaged Bank of America and Citizens Federal Bank in protracted litigation in both state and federal courts, when the best result she could ever hope for would be a result permitting the other entity to foreclose. She did not appeal the state court judgment which found the lien valid and enforceable. This appeal stems from a subsequent Bankruptcy Court adversary case judgment in which the court found that res judicata and collateral estoppel barred Nelson's Complaint, as well as laches. Certiorari should be denied.

STATEMENT OF THE CASE

In November of 1991, Edna Nelson ("Nelson") filed an adversary complaint against her ex-husband Ralph Nelson in his Chapter 7 bankruptcy proceeding. The banks were not parties. (Petn 5)[1] To settle the complaint, in February of 1993 they stipulated that Nelson was awarded certain real property, including the Tonapah Residence (aka "Lot 13," the subject of the within Petition), subject to existing liens, and Nelson reserved the right to contest any liens on the property. (App 08-22) Bank of America had loaned money to the Nelsons secured by a trust deed on Lot 13 which it assigned to Citizens Federal Bank in 1986, and Bank of America serviced the loan. (BA's ER 39) Its Servicing Agreement with Citizens required Bank of America to foreclose on security for seriously delinquent loans. (BA's ER 111-112) Bank of America obtained relief from the automatic stay in Ralph Nelson's bankruptcy on July 28, 1992, on the grounds there was no equity in the property and for lack of adequate protection. (Nelson's ER 111-112) The foreclosure sale was set for March 23, 1993. (App 31)

Although Nelson knew in July of 1992 that Bank of America had obtained relief from the automatic stay to foreclose (Petn 6), Nelson waited until the day before the foreclosure sale, March 22, 1993, to challenge the lien. She filed a Riverside County Superior Court Complaint, alleging that the Banks and her ex-husband conspired to have him

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1. "Petn" refers to Michaels' Petition for Writ of Certiorari. "App" refers to Michaels' Appendix to Petition for Writ of Certiorari. "ER" refers to Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals, No. 96-56822. "BA's ER" refers to Bank of America's and Citizens Federal Bank's Excerpts of Record filed in the Ninth Circuit appeal.

default on the loan and cause the foreclosure, and alleged that neither bank was the beneficiary under the trust deed. (BA's ER 00-37) Nelson initially obtained a temporary restraining order postponing the foreclosure sale, but days later the Superior Court denied Nelson's motion for preliminary injunction to enjoin the foreclosure sale, and the sale went forward on April 16, 1993. (App 31) Ralph Nelson's bankruptcy proceeding was closed March 7, 1994. (Petn 10) On February 16, 1995, the Superior Court granted Bank of America's motion for summary judgment as to Nelson's Complaint, finding that it had no merit. (BA's ER 38-41) Nelson did not appeal the judgment.

Nelson claims at this time (December 1994) she became aware that she was not at the closing of the escrow on Lot 13 and thus the deed did not contain her signature. (9th Cir. AOB 29) Nelson then reopened her ex-husband's bankruptcy proceeding and filed an adversary complaint against the respondent banks (Adv. No. SB-95-01438-MG), *again* alleging that Bank of America had no right to foreclose, on the theory that Bank of America claimed to be the beneficiary when Citizens was actually the beneficiary, and that her signature was forged. (ER 39) The Bankruptcy Court granted the banks' motions to dismiss the adversary case on the alternative grounds that there was no malicious or willful violation of the stay and that Nelson's action was barred by laches for her failure to challenge the lien prior to the foreclosure sale. (App 27-32)

The District Court affirmed the Bankruptcy Court's decision. (App 33-36) The Ninth Circuit affirmed on the grounds of res judicata and collateral estoppel (based upon the Superior Court judgment), and because Nelson's estate had no interest in the property once it was foreclosed upon

and sold, so her estate could not maintain the action to determine the extent of the lien. (App 1-2)

Before the Ninth Circuit's memorandum decision issued, Nelson moved for summary disposition of her appeal based on a motion she had just filed in the Bankruptcy Court to disqualify bankruptcy court Judge Mitchel Goldberg, which had not yet been decided. (App 3) Shortly thereafter, the Bankruptcy Court (by a different judge) denied Nelson's motion to disqualify the judge, and Nelson did not appeal the order. The Ninth Circuit denied Nelson's motion for summary disposition. Nelson (through Michaels) filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which also was denied.

THE QUESTIONS PRESENTED DO NOT RAISE IMPORTANT QUESTIONS SUFFICIENT TO JUSTIFY GRANTING THE PETITION.

Rule 10 of the Rules of the Supreme Court of the United States provides, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."

No compelling reasons exist to grant the petition in this case. The petition does not raise any important federal questions, constitutional questions, or conflicts to resolve, nor was there any error by the courts below.

A. Res Judicata and Collateral Estoppel Bar Nelson's Federal Court Challenges to the Bank's Right to Foreclose.

In two successive court actions, Nelson challenged Bank of America's right to foreclose, the first in the state Superior Court and the second in the Bankruptcy Court adversary action. Because the Superior Court found the lien valid, and that judgment is final and unappealed, the second action is barred by reason of res judicata and collateral estoppel, as the Ninth Circuit correctly held. *First National Bank v. Russell (In re Russell)*, 76 F.3d 242, 245 (9th Cir. 1996). No reason exists for this Court to review this ruling.

B. Nelson and Her Estate Lack Standing to Challenge the Bank's Lien.

The Ninth Circuit also correctly determined that since Lot 13 was properly foreclosed upon and sold to a third party, Nelson's estate had no interest in the property and no right to contest the Bank's lien. (App 2; ER 39) Also, as a mere creditor of the debtor, Nelson lacked standing to attack violations of the automatic stay. *Tilley v. Vucurevich (In re Pecan Groves of Arizona)*, 951 F.2d 242, 245 (9th Cir. 1991). The type of relief Nelson sought is properly vested only in two parties, a bankruptcy trustee or a debtor in possession. *Magnoni v. Globe Inv. & Loan Co., Inc. (In re Globe Inv. & Loan Co., Inc.)*, 867 F.2d 556, 559-560 (9th Cir. 1989).

It also appears the Bankruptcy Court lacked jurisdiction to hear Nelson's adversary complaint against the Banks since Lot 13 had passed outside of the Bankruptcy Court's jurisdiction when the parties stipulated that Lot 13 would belong to Nelson subject to the lien, and the property was

sold in the foreclosure sale. *Matter of Edwards*, 962 F.2d 641, 643 (7th Cir. 1992); *Great Western Savings v. Gordon (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988).

C. The Bankruptcy Judge Did Not Lack Jurisdiction to Order Relief from Stay Based on his Alleged Ownership of Stock.

Petitioner alleges the bankruptcy judge lacked jurisdiction to order relief from stay because he allegedly owned stock in the "movant" or "respondents." (Petn 1, 3) Petitioner's moving papers assert the judge owned 50 or 80 shares of stock in BankAmerica Corp., the *parent* entity of movant Bank of America, N.T. & S.A., and in NationsBank Corp., which later acquired Citizens Federal Bank *after* the order granting relief from stay. Petitioner's motion to disqualify the judge was denied (by a disinterested judge), and Petitioner did not appeal that order. (9th Cir. Petn. for Rhrg. p. 4 and App 26)

The issue was not properly before the Ninth Circuit since Nelson did not appeal the Bankruptcy Court order denying her motion to disqualify the judge, nor raise the issue in her briefs on the merits at any level prior to the within Petition for Writ of Certiorari. *Allen v. Old National Bank of Washington (In re Allen)*, 896 F.2d 416, 418 (9th Cir. 1990) (per curiam); 28 U.S.C. § 158(a) and (d); *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978). Therefore, the issue is not properly before this Court either. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 119 S.Ct. 924, 930 (1999).

Second, Nelson was not the debtor. She had no standing to contest the relief from stay order. *Tilley v. Vucurevich, supra*, 951 F.2d 242, 245.

Third, laches bars Petitioner's claim since relief from stay was ordered on July 28, 1992, and Nelson did not raise this argument until 1997, when briefing was finished in the Court of Appeals. *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 868, 108 S. Ct. 2194, 2206-2207 (1988). Nelson received the judge's disclosure reports on or about December 30, 1995. (Nelson's Declaration in Support of Motion for Disqualification of Judge Goldberg, p. 10, ¶ 47, attached to 9th Cir. Request for Judicial Notice.) Further, a one-year limitations period applies to motions to vacate an order under Federal Rules of Civil Procedure Rule 60(b) based on mistake, inadvertence, surprise, or excusable neglect.

Finally, the bankruptcy judge was not without jurisdiction even if he did own the stock. Rather, once a judge *has* disqualified himself, he or she may enter no further orders in the case. *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956). The authority Petitioner cites, *Moody v. Simmons*, 858 F.2d 137 (3rd Cir. 1988) is read narrowly to state that mandamus is appropriate to vacate the orders of a judge who continues to sit despite previously having expressed the intent to disqualify himself or herself. *Pfizer, Inc. v Kelly (In re School Asbestos Litigation)*, 977 F.2d 764, 776 (3rd Cir. 1992). Here, Nelson's motion to disqualify the judge was properly denied (by a different judge), the bankruptcy judge never stated an intention to disqualify himself, and he never was disqualified. No jurisdictional question is presented to this Court.

D. The Proper Entity Obtained Relief From Stay and Foreclosed.

Petitioner argues that because Bank of America was not a party in interest when it requested and obtained relief from the stay (she alleges Citizens was), the Bankruptcy Court acted outside its jurisdiction in making the order granting relief from stay to Bank of America. (Petn 2, 17) (This issue is reached only if the Court finds Bank of America was not the party in interest.) She also asserts that Citizens foreclosed on the property. (Petn 2, 12)

Again, Petitioner has no standing to raise this issue because she was not the bankruptcy debtor. *Tilley v. Vucurevich, supra*, 951 F.2d 242, 245.

Petitioner's argument is also simply incorrect. Contrary to Petitioner's reading of the Trustee's Deed Upon Sale, Citizens was the *purchaser* at the trustee's sale. (Petn 2, 12, ER 120-121) Bank of America foreclosed as servicing agent for Citizens Federal Bank. (ER 120-121) Bank of America had assigned its note and trust deed to Citizens Federal Bank in 1986 and continued to service the loan on Citizens' behalf through the sale. (BA's ER 39) Their Servicing Agreement required Bank of America to foreclose on mortgaged properties under default. (BA's ER 111-112) Bank of America obtained relief from stay and caused the trustee to foreclose, and Citizens purchased the property at the sale. (BA's ER 39; ER 120-121)

E. Petitioner's Abstention Argument Lacks Merit and was not Properly Raised Below.

Petitioner asserts that 28 U.S.C. § 1334(c)(1) required the Bankruptcy Court and District Court to abstain before the state Superior Court considered a core bankruptcy matter, although Petitioner does not specify what matter the Courts should have abstained from hearing. Section 1334(c)(1) does not require abstention, as Petitioner argues. It is discretionary.

Petitioner did not assert this abstention argument in her Ninth Circuit brief on the merits, and it should not be considered by this Court. *National Collegiate Athletic Assn. v. Smith*, *supra*, 525 U.S. 459, 119 S. Ct. 924, 930.

Procedurally, Petitioner's argument makes no sense. Nelson chose the state court forum herself and did not ask the Bankruptcy Court to abstain, nor does she state any authority for her proposition that a court must affirmatively abstain under these circumstances. Also, since the District Court was not involved until January 1996, a year after Nelson's state court case was dismissed, it was impossible for it to abstain. (Petn 9, 13)

Nelson's lien challenge before the Superior Court was not a "core" bankruptcy matter. Lot 13 was out of the debtor's estate due to the settlement. (Petn 8, 9) Core proceedings are those matters necessarily incidental to a bankruptcy case that affect the restructuring of debtor-creditor relations and the liquidation of estate assets. *Edgcomb Metals Co. v. Eastmet Corp.*, 89 B.R. 546, 548 (D. Md. 1988). Non-core proceedings are not subject to mandatory abstention provisions. 28 U.S.C. § 157.

Nor does the Stipulation guarantee to Nelson that the Bankruptcy Court would hear her lien challenges, as she claims. (Petn 2, 7-8) The stipulation merely permits her to challenge the liens but does not specify a forum (App 13), and the Bankruptcy Court reserved jurisdiction only to implement the terms of the stipulation, not to retain exclusive jurisdiction to hear Nelson's lien challenge. (App 19)

CONCLUSION

There was no error below, and there are no important questions or conflicts for this Court to respondent. Bank of America N.A. respectfully asks this Court to deny the petition.

Respectfully submitted,

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